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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JUAN CARLOS RIVERA,

12 Plaintiff,

13 v.

14 WACHOVIA BANK, a National Banking
15 Association; WACHOVIA MORTGAGE
16 CORPORATION, a North Carolina
17 corporation f/k/a WORLD SAVINGS
BANK, FSB; and DOES 1-200, inclusive,

18 Defendants.

CASE NO. 09 CV 0433 JM (AJB)

**ORDER GRANTING DEFENDANT
WACHOVIA MORTGAGE'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

(Doc. No. 21)

19 Plaintiff Juan Carlos Rivera ("Plaintiff") initiated this action in California state court,
20 advancing several claims which arose out of a residential mortgage refinancing transaction. Defendant
21 Wachovia Mortgage, FSB ("Wachovia"), erroneously named and sued as Wachovia Bank, N.A. and
22 Wachovia Mortgage Corporation, removed the action to federal court on March 4, 2009. (Doc. No.
23 1.) The court enjoys subject matter jurisdiction based on diversity. (See Doc. No. 19.)

24 Pending before the court is Wachovia's motion to dismiss Plaintiff's First Amended Complaint
25 (Doc. No. 20, "FAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Doc. No. 21.) Based
26 on full briefing by the parties, including Plaintiff's opposition (Doc. No. 22, "Opp'n") and Wachovia's
27 reply ("Doc. No. 24, "Reply"), the court found the matter appropriate for determination without oral
28 argument.

1 For the reasons set forth below, the court **GRANTS** Plaintiff's motion to dismiss and
2 **DISMISSES** Plaintiff's FAC with prejudice.

3 **I. BACKGROUND**

4 On October 22, 2004, Plaintiff and his wife obtained an adjustable rate home mortgage loan
5 for \$353,400 from World Savings Bank, FSB, now Wachovia Mortgage, FSB, through which they
6 refinanced their Escondido home. (FAC ¶¶ 4, 10; Req. for Jud. Not., Exh. 5 at 11.) The loan was
7 secured by a Deed of Trust on Plaintiff's property. (FAC, generally; Doc. No. 21-3, Req. for Jud.
8 Not., Exh. 6.) Plaintiff later defaulted on the loan, leading to the initiation of foreclosure proceedings.
9 (FAC ¶ 12.) The present status of any pending or completed foreclosure sale is unclear from the
10 parties' submissions.

11 Plaintiff alleges that although Wachovia knew he could not afford the mortgage payments, the
12 lender induced him to sign the loan documents through inadequate disclosures of the applicable
13 interest rate and its adjustment over time, and through misrepresentations about his ability to pay, the
14 allocation of monthly payments between principal and interest, and the amortization feature of the
15 loan. (FAC ¶¶ 32-34.) Plaintiff asserts that, at the time of signing, he understood the loan terms to
16 include fixed monthly payments and interest rate for the first three years (although Plaintiff
17 acknowledges he anticipated "a slight adjustment" to the interest rate) and a pre-payment penalty
18 during the same period. (FAC ¶¶ 10, 13.) According to Plaintiff, it was not until January 2007 that
19 he discovered both the principal balance and interest rate had dramatically increased. (FAC ¶ 11.)

20 Plaintiff asserts state law claims for fraud, breach of contract, breach of contractual covenant
21 of good faith and fair dealing, unfair business practices, and conspiracy, and to quiet title. Plaintiff
22 seeks injunctive relief, damages, attorneys' fees and costs, and a court order declaring the loan
23 transaction void.

24 **II. DISCUSSION**

25 **A. Legal Standards**

26 Rule 12(b)(6) dismissal is proper only in "extraordinary" cases. U.S. v. Redwood City, 640
27 F.2d 963, 966 (9th Cir. 1981). In evaluating a 12(b)(6) motion, the court must accept the complaint's
28 allegations as true and construe them in the light most favorable to Plaintiff. See, e.g., Concha v.

1 London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S.Ct. 1710 (1996). However, the
 2 complaint's "factual allegations must be enough to raise a right to relief above the speculative level...."
 3 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (allegations must provide "plausible grounds
 4 to infer" that plaintiff is entitled to relief). The court should grant 12(b)(6) relief where the complaint
 5 lacks either a "cognizable legal theory" or facts sufficient to support a cognizable legal theory.
 6 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). In testing the complaint's legal
 7 adequacy, the court may consider material properly submitted as part of the complaint, including
 8 exhibits attached thereto, or material subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756,
 9 763 (9th Cir. 2007). Furthermore, under the "incorporation by reference" doctrine, the court may
 10 consider documents "whose contents are alleged in a complaint and whose authenticity no party
 11 questions, but which are not physically attached to the [plaintiff's] pleading." Janas v. McCracken (In
 12 re Silicon Graphics Inc. Sec. Litig.), 183 F.3d 970, 986 (9th Cir. 1999) (internal quotation marks
 13 omitted).¹

14 **B. Analysis**

15 Wachovia, a federally chartered savings bank, contends all of Plaintiff's state law claims are
 16 preempted by the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 *et seq.* ("HOLA"), and the
 17 regulations issued thereunder by the Office of Thrift Supervision ("OTS"), because the factual
 18 underpinnings of these claims fall within HOLA's preemptive scope.

19 Under HOLA, OTS enjoys "plenary and exclusive authority...to regulate all aspects of the
 20 operations of Federal savings associations" and its authority "occupies the entire field of lending
 21 regulation for federal savings associations." 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit agreed,
 22 characterizing the enabling statute and subsequent agency regulations as "so pervasive as to leave no
 23 room for state regulatory control." Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256,
 24 1260 (9th Cir. 1979), aff'd, 445 U.S. 921.

25 In elaborating on the reach of HOLA, the Supreme Court held, "A savings and loan's mortgage
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27 ¹ To this end, the court may consider the Mortgage Note, Deed of Trust, Truth in Lending
 28 Disclosure, and payment coupons provided by Wachovia in its Request for Judicial Notice. (Doc. No.
 21-3, Exhs. 5-8.) As Wachovia's status as a federal savings bank is not challenged, the court declines
 to take judicial notice of Wachovia's charter documents. (Doc. No. 21-3, Exhs. 1-4.)

lending practices are a critical aspect of its ‘operation’” Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 167 (1982). To this end, OTS Regulation 560.2(b) expressly preempts state regulation of federal thrift activities dealing with, *inter alia*, terms of credit (including amortization of loans, deferral of interest, and adjustments to the interest rate), loan-related fees, servicing fees, disclosure and advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R. § 560.2(b). In analyzing preemption, then, “the first step will be to determine whether the type of law in question is listed in paragraph (b).” Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1005 (9th Cir. 2008). If so, the state law is preempted. Id. Even state laws of general applicability, such as tort, contract, and real property laws, are preempted if their enforcement would impact thrifts in areas listed in § 560.2(b). Id. at 1006; 12 C.F.R. § 560.2(c). Alternatively, such laws are preempted if they have more than an incidental effect on the lending operations of a federal savings association. 12 C.F.R. §§ 560.2(c); OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996).²

Plaintiff seeks relief under state tort, contract, real property, and consumer protection laws of general applicability which do not explicitly regulate lending activities. However, despite his cursory argument to the contrary (see Opp’n at 5), he asks the court to apply the laws to regulate conduct which is expressly preempted by 12 C.F.R. § 560.2(b). Plaintiff’s allegations revolve entirely around the “processing, origination, [and] servicing” of the Plaintiff’s mortgage, the “terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan,” and the adequacy of disclosures made by Defendants in soliciting and settling the loan. 12 C.F.R. §§ 560.2(b)(4), (9), (10). Because the state laws on which Plaintiff relies, as applied, would regulate lending activities expressly contemplated by the § 560.2(b), the claims are preempted. See Silvas, 514 F.3d at 1006 (9th Cir. 2008) (holding California’s Unfair Competition Law, as applied, was preempted because the underlying allegations dealt with misrepresentations in disclosures and advertising). There is no need for the court to proceed to the second step of the analysis.

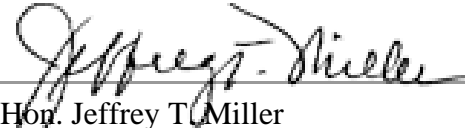
² State laws which do not affect lending practices might include tax statutes or zoning ordinances. See de la Cuesta, 458 U.S. at 172 (O’Connor, J., concurring) (noting HOLLA’s language does not suggest “Congress intended to permit [OTS] to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.”).

1 Wachovia also argues Plaintiff's FAC should be dismissed because Plaintiff's state law claims
2 are time-barred and fail to meet federal pleading standards. Because the claims are preempted, the
3 court declines to address these secondary arguments.

4 **III. CONCLUSION**

5 For the reasons set forth above, the court hereby **GRANTS** Wachovia's motion to dismiss
6 (Doc. No. 21). Plaintiff's First Amended Complaint, including all claims raised therein, is
7 **DISMISSED** with prejudice. The Clerk of Court is instructed to close the case file.

8 DATED: August 4, 2009

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10 Hon. Jeffrey T. Miller
11 United States District Judge
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